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IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

**On Appeal From the United States Court of Appeals
for the Ninth Circuit.**

**SUPPLEMENT TO APPENDIX OF
JURISDICTIONAL STATEMENT.**

APPENDIX C.

**Opinion of the United States District Court,
Central District of California.**

United States District Court, Central District of California.

Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation, Plaintiffs,

v. The City of Burbank, a municipal corporation, et al., Defendants. Air Transport Association of America, Intervening Plaintiff. No. 70-1075-EC.

MEMORANDUM FOR USE IN PREPARATION OF
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT.

Filed: September 24, 1970.

The within action is for declaratory relief and injunction whereby the plaintiffs seek to invalidate an Ordinance of the City of Burbank which prohibits the take-off by jet aircraft from Hollywood-Burbank Airport (HBA) between the hours of 11:00 P.M. (2300) and 7:00 (0700), the next day.

The plaintiff Lockheed Air Terminal, Inc., is the owner and operator of HBA. Plaintiff Pacific Southwest Air Lines (PSA) is an intrastate carrier.

The intervening plaintiff, Air Transport Association of America (ATA), is an unincorporated trade association consisting of some 32 carriers commonly known as scheduled airlines. The members of the Association fly approximately 2400 planes, the great majority of which are jet aircraft.

The Federal Aviation Administration (FAA) has filed an Amicus Curiae brief in support of the position of the plaintiffs.

The City of Burbank and certain public officials are named defendants. The People of the State of California (California) filed an Amicus Curiae brief in support of the validity of the Burbank Ordinance (BuOr).

The provisions of Section 1331(a) and 1337 of Title 28, U.S.C., vest this Court with jurisdiction and venue.

The issues of law involved are:

- (1) Has the Federal Government so preempted the fields of the use of air space and the regulation of air traffic as to invalidate and preclude enforcement of the BuOr?
- (2) Is the Ordinance in conflict with Federal statutes or regulations and thereby rendered unenforceable by the Supremacy Clause?
- (3) Would the enforcement of the Ordinance result in intolerable and unreasonable burden on interstate commerce?
- (4) Does the Ordinance constitute an attempted regulation of the phase of the National commerce which, because of the need of National uniformity, demands that its regulation be prescribed by a single authority?

The admitted facts are set forth in the Pre-Trial Conference Order and are as follows:

1. Plaintiff Lockheed Air Terminal, Inc., (hereinafter "Lockheed"), is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the owner and operator of the Hollywood-Burbank Airport.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated

trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; United Air Lines, Inc.; Western Air Lines, Inc. Among its other members is Continental Air Lines, Inc., which obtained authority pursuant to Civil Aeronautics Board Order No. 70-5-52, issued May 12, 1970, "to engage in air transportation with respect to persons, property, and mail . . . between the terminal point Seattle-Tacoma, Wash., the intermediate points Portland, Oreg., and San Francisco-Oakland-San Jose, Calif. (to be served through the Metropolitan Oakland International Airport and the San Jose Municipal Airport), and the terminal point Los Angeles-Ontario-Long Beach-Hollywood-Burbank-Santa Ana-Orange County, Calif. (to be served through the Ontario International Airport, the Long Beach Municipal Airport, the Hollywood-Burbank Airport, and the Orange County Airport)."

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants, Gilbert, McKenzie, Haven, Swanson and Gibson, constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant, Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930 and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the

Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970. The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. As a result of the process of industrialization and urbanization, almost one out of every twenty people in the United States lives in the Los Angeles five-county area.

11. Hollywood-Burbank Airport is the most convenient airport for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena, and Alhambra, an area containing a population of over 2.2 million persons.

12. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways

are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and, Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lie on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

13. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon.

14. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

15. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission which provides as set forth in said Certificate.

16. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

17. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

18. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport, which Operations Specifications provide as set forth therein.

19. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

20. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA (FAR 61.3(a)). Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator (FAR 61.161). Each flight engineer of a civil aircraft of United States registry is required to have in his per-

shall possess a current flight engineer's certificate issued by the Administrator (FAR 63.3(b)).

21. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, Stat. (May 21, 1970), within two years from the date of enactment.

22. The FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport. In connection with such operation the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway and identification lights, and radar and radio equipment.

23. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such separation, and which operates within controlled airspace identified as "control zones" and "control areas." Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The

airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area (FAR 1.1). Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower (FAR 91.87(b)). He is further required to comply with all clearances and instructions that may be issued by Air Traffic Control (FAR 91.75(b)). Air Traffic Control over the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility. (FAR 91.115, 91.75(a)).

24. Prior to the commencement of operations involving jet aircraft landings and take-offs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

25. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Air Traffic Control (FAR 91.87(h)). When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with Air Traffic Control. It is at that time assigned a runway for take-off and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA take-off procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. (FAR 91.87(f)) Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Pictorial charts showing these standard instrument departure procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein (FAR 91.75(a), 91.116). Upon reaching an altitude and position clear of other traffic, control of the aircraft is passed from Hollywood-Burbank Departure Control to the FAA Air Route Control Center located at Palmdale, California.

26. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is re-

quired for a safe landing. (FAR 91.87(d)(2)) No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance (FAR 91.87(h)). In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. (FAR 91.87(d)(2)) The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations (FAR 91.116).

27. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing," and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable (FAR 91.87(d), (f)).

28. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. This was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California.

29. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

30. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

31. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

The plaintiffs urge that the BuOr is invalid for the following reasons:

(a) The preemption of the field of efficient management of the use of the navigable air space by the Federal Government by statute and regulations and through its agencies, FAA and Civil Aeronautics Board (CAB),

(b) The direct conflict between the BuOr and Federal statutes, regulations and Certificates of Public Convenience and Necessity issued to airlines by the CAB, and

(c) The ordinance is an intolerable and unreasonable burden on interstate commerce.

The defendant City of Burbank and its officials and the People of California contend that there has been no preemption in the field of navigable air space control, of limitation of aircraft take-offs by the Federal Government, or its agencies, which would invalidate the BuOr. The City urges that the Ordinance is in reality a "land use" regulation and that Lockheed, as the owner and proprietor of HBA, has the authority to place valid limitations on take-offs of jet aircraft during the curfew and that the City can, in turn, control Lockheed with respect to its land use.

Reliance as to land use is on a statement of the Senate Committee in 1968 to the effect that it was not the intent of the Committee, in recommending the air noise abatement legislation H.R. 3400, to effect any change in the existing apportionment of powers between the Federal and State and local governments

and that the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers was not diminished by the bill. S.Rep. 1353, July 1, 1968, U.S. Code, Congressional and Administrative News, 1968, pages 2693-94.

With respect to the Commerce Clause, the defendants argue that in considering the effect of the Ordinance on interstate commerce the Court is limited to the flights out of HBA during the curfew hours and that only the intrastate carrier PSA is involved since that is the only line authorized by the California Public Utilities Commission which has jet aircraft scheduled to take off during curfew. There are privately owned jet planes that fly out of HBA between 11:00 P.M. and 7:00 A.M., but which do not have Certificates of Public Convenience and Necessity from California or CAB.

PREEMPTION

The House Report 2360, 85th Congress, 2nd Session, on the Federal Aviation Act of 1958, states as to its purpose: "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." [Page 3741.]

That Act established the Federal Aviation Agency, now Federal Aviation Administration, in replacement of the then Civil Aeronautics Administration. The FAA was vested with "plenary authority to—(a) Allocate airspace and control its use by both civil and military aircraft."

The Senate Report 1811 on the 1958 Act, after observing that the action of the CAB in its control over airspace allocation and air traffic rules rested for the

most part upon “* * * the shifting sands of legal ambiguity”, says: “The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency.” The report thereafter states: “The splintering of airspace management in the past through committee and panel negotiation has already been discussed. It is one of the evils which this bill is designed to eliminate. As indicated above, it is for this reason that the bill proposes to vest in a single Administrator plenary authority for airspace management. If such authority is once again fractionalized and made subject to committee or panel decision, the evil will only be continued.” In the same report, the Committee observes: “The number of planes seeking their share of our airspace has almost quadrupled since 1938. Furthermore, the larger and faster that aircraft have become, the more airspace is required for each if proper separation is to be maintained.”

The defendants rely on *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1959), as authority for their position that intent to preempt shall not be implied

“* * * unless the act of Congress fairly interpreted is in actual conflict with the law of the State.”

[Page 443.]

The Supreme Court further observes that in consideration of whether a State law has imposed an undue burden in interstate commerce, we should be mindful of the fact that the Constitution, when conferring upon Congress the regulation of commerce, did not intend

“* * * to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indi-

rectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' [Citing cases.] But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." [Citing cases] [Pages 443-44.]

The Detroit Ordinance which was upheld by the Supreme Court involved smoke abatement, and had been violated by one of the ships of appellant company duly licensed to operate in interstate commerce under a regulation enacted by Congress. Air pollution is a local problem and the purpose of the Ordinance was to protect the health and enhance the cleanliness of the local community.

The Court concluded that the mere possession of a Federal license did not immunize the ship from the operation of the normal incidents of police power, not constituting a direct regulation of commerce. Furthermore, the Ordinance did not exclude a licensed vessel from the Port of Detroit, "* * * nor does it destroy the right to free passage." [Pages 447-48.]

Applying the rules in the Huron case to the case at bar, we must determine whether the Federal Government, as evidenced by the acts of Congress and regulations involved, intends to fully occupy the field of control of the navigable air space to insure its efficient use. Whether the Ordinance brings to bear an unreasonable burden on interstate commerce is also involved and will be discussed in more detail later in this Memorandum.

The question of intent to fully occupy the pertinent field was considered by the Supreme Court in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). The Georgia statute there involved required curtains and automatic fire-box doors on locomotives. The Court said that the main question in the three cases which were involved on the appeal was whether the Boiler Inspection Act

“* * * has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so.” [Citing cases.]

The Court said that the Interstate Commerce Commission Boiler Inspection Act applied to locomotives in interstate commerce even if operated wholly within one State and not engaged in hauling interstate freight. The Act did not require any particular type of fire-box door but the Court said that although the Commission had made no other requirement inconsistent with the State legislation that fact was without legal significance.

“It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad

scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. [Citing cases.]”

In answering the question as to whether the Federal Government acted with the intent to preempt a field, the Supreme Court, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), set forth, in the disjunctive, three tests to be applied:

“So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways.

(1) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm’n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. (2) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varn-*

ville Co., 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. (3) Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend v. Yeomans*, 301 U.S. 441; *Kelly v. Washington*, 302 U.S. 1; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177; *Union Brokerage Co. v. Jensen*, 322 U.S. 202." [Underscored numbers (1), (2) and (3) added.] Pages 230-31.

In applying the rules in the *Rice* case, *supra*, to the case at bar, we consider the facts and circumstances here involved.

The terms of the 1958 Federal Aviation Act would appear to encompass the efficient use and control of the navigable air space in all aspects of its use by aircraft. Control was effected of the traffic density by regulation 14 F.C.R. 93.121-31, in limiting the instrument flight rules (IFR) operations in high density airports, Kennedy and LaGuardia (N.Y.), Newark (N.J.), O'Hare (Chicago), and Washington National Airport (Wash., D.C.). In limiting the allocations of flights as to various classes of aircraft, the number of flights varied during different periods of a twenty-four hour day.

By way of comment on the regulations applying to the above named high density airports, it is reported in

Federal Register, Vol. 33, No. 234, page 17896, Dec. 12, 1968—part 93, that the allocation of flights was to provide relief from excessive delays, not to correct safety problems. At page 17897, the FAA Administrator says: “* * * the public interest in efficient, convenient, and economical air transportation requires more effective use of airport and airspace capacity. The authority of the FAA to regulate aircraft operations to reduce congestion is clear. The plenary authority conferred by the Federal Aviation Act to regulate the flight of aircraft to assure the safe and efficient utilization of the navigable airspace is well established by practice and judicial decision.”

Congress and the Administrator are fully cognizant of the problems created by aircraft noise. The Administrator, on page 17897 of the Federal Register, *supra*, refers to the fact that current scheduling practices reflect that two-thirds of the international passenger flights at Kennedy airport were scheduled to arrive or depart between 3:00 P.M. and 11:00 P.M., but that under the allocations imposed some re-scheduling of these flights might be required. He said that international departures fall off abruptly after 10:00 P.M. and *clearly it would not be in the public interest, considering resultant noise disturbances, to encourage scheduling of more flights at later hours.* The paragraphs 93.121-131 of the regulation referred to above appear on page 17898 of Volume 33, Federal Register, *supra*.

In the instant case, the FAA, on September 4, 1969, issued a noise abatement order for HBA making runway No. 25 a preferential runway for departure from 11:00 P.M. to 7:00 A.M. (Bur. 7100.5B, para. 5c, *plffs'* Ex. 30). This preference was a noise abatement measure for the benefit of the City of Burbank. See

Exhibit A hereto for map including the City of Burbank and showing the location of HBA. This map is a portion of plaintiffs' Exhibit No. 1 herein, to which the Court has added the numbered runways 33 and 25 together with the direction of aircraft approach and take-off on all four runways involved.

Further efforts of Congress to control and abate aircraft noise are encompassed in the provisions of Section 1431, Title 49, United States Code, passed by Congress in 1968 and providing for the FAA Administrator to prescribe such rules and regulations he may find necessary to control and abate aircraft noises and sonic boom.

From the broad scope of Federal statutes and regulations governing and controlling the use of air space and of air traffic, it would appear that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use.

Included in the statutes in this field are 49 U.S.C. §§ 1301(24), 1303, 1304, 1341(a), 1348 and 1508.

It is true that Section 1506 of Title 49, U.S.C., states that the provisions of Chapter 20 (Title 29, "Federal Aviation Program") are in addition to the remedies then existing "* * * at common law or by statute." Defendants also point to Senate Report 1353, July 1, 1968, *supra*, wherein it is stated: "It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State local governments." Page 2693. It is to be noted that the Senate Report, at pages 2693 and 2694, also states: "The courts have held that the Federal Government presently preempts

the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."

In evaluating Section 1506, *supra*, and the statements of the Senate Committee, we must have in mind the rules governing preemption as announced by the Supreme Court and the provisions of the Commerce Clause of the United States Constitution.

In *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Supreme Court states at page 107:

"Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the

air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. *A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.* [Emphasis added.]

Mr. Pyle, Director of Aviation Development Council at La Guardia airport, New York City, testified: "The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation." [R. Tr. 349.] He also stated that air transportation was to be differentiated from surface transportation because of the variance in the degree of flexibility between the two.

In viewing the effect of the BuOr with respect to preemption and the Commerce Clause issues, it appears that the Ordinance should be considered from the national level. The Supreme Court so held as to the railroads in *Chicago vs. Santa Fe*, 357 U.S. 77, 86-87 (1957).

The case of *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (D.C., E.D., N.Y., 1966), involved an Ordinance regulating noise levels which denied the lower air space to aircraft and closed the landing approaches and take-off paths of the Hempstead airport. The court said that the decisive question was whether the Ordinance " * * * conflicted with Federal law, or invades a field of legislation reserved to the National government."

In discussing the test of power to enact the Ordinance, the court states:

"Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. * * * In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. * * * The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.

"* * * legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. * * *

"But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." [Pages 231-32.]

After enumerating the Federal statutes, regulations and activities of Federal agencies in the field of air navigation and traffic, the Court observes:

"The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance." [Citing numerous cases.] Page 233.

At page 235 the Court says:

"Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic."

VIOLATION OF COMMERCE CLAUSE

Congress is vested with the authority to regulate commerce among the States by Article I, Section 8, Clause 3, of the Constitution. The rule is well established that state and local governments may not unreasonably burden commerce by their acts. The BuOr, while it does not seek to completely deny the use of navigable air space, does seek to eliminate its use by jet aircraft for eight hours of the day.

Continental Airlines, an interstate carrier by virtue of Certificate of Public Convenience and Necessity issued by the CAB on May 12, 1970, Exhibit 9, now serves the Hollywood-Burbank area from the HBA. One of its scheduled routes is from Burbank to Seattle-and return. The evidence shows that if Seattle imposed an ordinance similar to the BuOr no jet aircraft could leave Seattle, or any city in the Northwest, for HBA after

7:00 P.M., nor could a plane depart HBA for Seattle after 7:00 P.M., in order to arrive at the respective destinations before the nocturnal curfew hour of 11:00 P.M. Thus, with such an Ordinance in effect in only two airports the hours of take-off from both airports for flights to and from Seattle would be curtailed to only twelve hours of the day, not eight hours as in the case of the curfew in force at only one of the airports.

The Certificate of Public Convenience and Necessity now issued to scheduled airlines by the CAB authorizes them to fly a specific route or routes and also obligates the line to give *adequate service* to the cities on their routes. [R. Tr. 232.]

General Von Kann, Vice-President, Operations and Engineering, of Air Transport Association of America, testified that a curfew Ordinance, if valid, would be adopted by virtually all types of local airport authorities. [R. Tr. 322.] Mr. Pyle testified in similar vein. [R. Tr. 334.]

The noise problem created by jet aircraft is well known and it appears to the Court that a curfew Ordinance, if valid, would promptly be adopted by virtually all cities surrounding airports. Considered singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases. However, considered on a national level, the Ordinance could not stand. Based on authorities discussed hereinabove, the Court concludes, as noted above, that in determining the effect on commerce the Ordinance is to be considered on a national basis. Mr. Mitchell, Vice-President of Continental Airlines in charge of corporate planning, Mr. Pyle, and General Von Kann, testified in depth on the effect of such an Ordinance,

on a national basis, on interstate commerce as well as on the efficient use of the air space. Some 1009 flights of scheduled airlines would have to be eliminated or re-scheduled. [Exhibit 52, R. Tr. 103-06.] Position problems as to planes would eliminate 1370-odd additional flight operations. [R. Tr. 336.]

Approximately 48% of air mail and 42% of air freight is moved at night. [Exhibit 55, R. Tr. 337-39.] It should be noted that no air mail is flown out of HBA.

If the experience of Continental is average, the Ordinance on a national basis would increase costs by 25% (R. Tr. 261-63) by reason of the loss in the utilization of aircraft as well as the required purchase of new planes to meet the concentration of flights within the permitted hours of take-off, if, in fact, the re-scheduling of flights so eliminated could be accomplished from a practical standpoint. Additional maintenance shops would also have to be established by all airlines to accomplish the required maintenance at necessary locations for proper and efficient use of their planes. [R. Tr. 302-305.]

It appears from the evidence that there would be a very serious loss of efficiency as to the use of air space if a national curfew were imposed. Obviously, if the use of the air space at HBA were curtailed by eight hours per day and this limitation of use time compounded by the adopting of such Ordinance effective as to other airports used by interstate and intrastate airlines, the carriage of interstate passengers and goods would be seriously interrupted and would conflict with the certificated rights and obligations of such airlines. See *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63-64

(1954), where the Court held the State of Illinois was without authority to revoke or suspend operations in that state of an interstate motor carrier for violation of a law regulating the weight of loads to be carried on the state's highways. *Southern Pacific v. Arizona*, 325 U.S. 761, 767 and 775 (1945), where the Supreme Court held invalid an Arizona Ordinance regulating the length of trains, the Court observing that if one state may regulate train lengths so may all others, resulting in a serious impediment to the free flow of commerce.

There is no conflict in the evidence adduced in this case and it should be concluded that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space.

The evidence discloses that air traffic is unique and should be controlled on the national level.

The case of *Stagg v. Municipal Court of Santa Monica*, 82 Cal. Rptr. 578 (Dec., 1969), is relied on by the defendants in support of their contention that there is no preemption by the Federal Government of the field covered by the BuOr so as to make the Ordinance invalid and unenforceable.

The Santa Monica Airport (SMA), which was involved, was city owned and the California District Court of Appeals (DCA) held a curfew Ordinance adopted by the City of Santa Monica, which precluded jet aircraft from taking off from the SMA between the hours of 11:00 P.M. and 7:00 A.M. the next day, to be valid. The SMA is not used by scheduled or intrastate airlines. The Appellate Court reversed the Superior Court's ruling that "* * * the Ordinance was invalid because its subject matter was preempted by

State law." The DCA held that the field was not so preempted and in the instant case the Attorney General also asserts non-preemption of the field by the State. At page 579 of its opinion, the DCA, in referring to the Superior Court, says:

"The court found it unnecessary to decide whether there was any federal preemption."

It observes two paragraphs later:

"Preliminarily, it must be recognized that the doctrine of federal preemption has no application here."

The opinion of the DCA, as to preemption, appears to turn on its conclusion that the curfew Ordinance was an unreasonable regulation which only incidentally affected the right of flight but did not impair that right. The Court, after stating its research, disclosed no Federal or California enactment which directly conflicts with the Ordinance in question, states:

"The United States by virtue of its sovereignty over navigable airspace has the paramount power to regulate air traffic. Federal statutes, after defining navigable airspace * * *, authorize the administrator to regulate the use of navigable airspace and to establish rules governing the flight, navigation, protection and identification of aircraft." [Page 580.]

The Court did not ground its decision on the proprietary capacity of the city but did discuss the city's rights to regulate its municipally owned airport as a public utility and the authority of the city to regulate the use of the airport under Section 50470-74, California Government Code. [Pages 580-81.]

Loma Portal Civic Club v. American Airlines, Inc., 39 Cal. Rptr. 708 (1964), a decision of the California Supreme Court in bank, is cited and discussed by the DCA in the Stagg case, *supra*. The members of the Loma Portal Civic Club resided in the flight path of jet aircraft using adjacent Lindbergh Field in San Diego. They sought to prohibit such flights at low altitudes and at such times as to interfere unreasonably with the use and enjoyment by plaintiffs of their homes.

The Court denied injunctive relief but did not find preemption on the part of the Federal Government as a grounds for precluding the relief sought. In denying relief, the Court said:

"It is clear, therefore, that it would be contrary to the policy of this state to grant an injunction against flight operations in the vicinity of a public airport, conducted by regularly scheduled, certificated airlines, not alleged to be conducted in violation of federal orders and regulations or in an imminently dangerous manner, and not alleged to be carried on in a manner inconsistent with the public interest inhering in the continuation of such service.

* * *

"We hold here that under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." [Pages 713-14.]

Reference is also made by the Court to the right of landowners who suffer from aircraft annoyances to seek damages from the owner or operator of the aircraft or the owner or operator of the airport involved. It also points out that it is not making a determination with respect to the rights of the parties where private airplanes and airports are concerned. [Pages 714, 715-16.]

The Court, in *American Airlines v. Town of Hempstead*, 272 F. Supp. 226, supra, also discussed the right of landlords to just compensation if overflights are of such a nature as to amount to a taking of property for public purposes. [Page 231.]

Prior to the decision in the Stagg case, supra, the City Attorney of Burbank rendered an exhaustive opinion to the Burbank City Manager, dated September 22, 1969, wherein he concluded that the City of Burbank had no power to limit or restrict flights of aircraft utilizing HBA. Copy of the opinion appears as Exhibit A to the supplemental memorandum of points and authorities filed by plaintiffs Lockheed and PSA on May 22, 1970.

The City Attorney now explains that his conclusion was based on the theory that the State of California had preempted the area of restriction of flights and amount of noise emitted by jet aircraft. However, on page two of the opinion, the City Attorney says: "The City of Burbank has no power to establish restrictions on flights or the amount of noise which may be emitted by aircraft using the Hollywood-Burbank airport for the reason that this area of control has been preempted by the State and Federal governments."

The opinion discusses several of the cases cited by counsel on both sides in the case at bar as well as the

activities of the Federal Government in the field involved.

In summarizing the opinion it is said, the residents in the vicinity of the HBA should limit their complaints to Lockheed Air Terminal and present their views as to noise to the FAA and the Department of Aeronautics of the State of California and that legislative action can only be accomplished by the Congress of the United States or the State Legislature.

The problems created by noise from jet aircraft are serious and disturbing, to say the least. Effective means has not as yet been found to reduce the noise to desired sound levels. In some airports the required use of certain runways in take-off will send the aircraft out over the ocean or other non-populated areas. However, in the landlocked, thickly populated area in which HBA is located, the use of preferential noise abatement runways is helpful to reduce the noise over Burbank but it merely diverts it to other populated areas. It will be noted from Exhibit A hereto that planes taking off on runway 25 are not over Burbank at any time, and the evidence shows that those taking off on runway 15, with destination to the North, turn West after take-off and are in the Burbank air space but for a very short time.

Our scientific and mechanical expertise has not yet solved the problem of noise resulting from the generation of power by jet engines. However, if the time during which the navigable air space may be used is to be curtailed, the Court concludes that the action must come from Congress, or its authorized agency, if the safe and efficient use of the air space is to be maintained and interstate commerce protected from unreasonable burden and interference.

The plaintiffs are entitled to injunctive relief, as prayed, and for their costs of suit herein.

Plaintiffs' counsel are requested to prepare, serve and lodge proposed Findings of Fact, Conclusions of Law and Judgment in accordance with the provisions of Local Rule 7.

This Memorandum is not to be deemed a final judgment.

DATED: September 24, 1970.

/s/ E. Avery Crary

E. Avery Crary

United States District Judge



APPENDIX D.

Findings of Fact and Conclusions of Law of United States District Court, Central District of California.

United States District Court, Central District of California.

Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation, Plaintiffs, vs. The City of Burbank, a municipal corporation, et al., Defendants.

Air Transport Association of America, Intervening Plaintiff. No. 70-1075-EC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed: November 30, 1970.

The within action having come on regularly for trial on September 15, 1970, before the Honorable E. Avery Crary, Judge presiding, plaintiffs Lockheed Air Terminal, Inc. and Pacific Southwest Airlines being represented by Kirtland & Packard, Robert C. Packard and Winston F. Tyler, intervening plaintiff Air Transport Association of America being represented by O'Melveny & Myers, Warren Christopher, Ralph W. Dau and Bertrand M. Cooper, and defendants all being represented by Samuel Gorlick, City Attorney, Richard L. Sieg, Jr., and Michael R. Murnane, except that defendant Samuel Gorlick is represented by Assistant City Attorney Richard L. Sieg, Jr., whereupon evidence both oral and documentary having been introduced by all parties, the cause having been argued and submitted for decision, and the Court on September 24, 1970 having filed its Memorandum for Use in Preparation of Proposed Findings of Fact, Conclu-

sions of Law, and Judgment, whereupon plaintiffs and intervening plaintiff having submitted Proposed Findings of Fact and Conclusions of Law and Judgment, defendants having filed their objections thereto and having requested additional findings, and the Court having heard the argument of counsel thereon;

WHEREFORE, the Court being fully advised in the premises now renders its decision as follows:

FINDINGS OF FACT

1. Plaintiff Lockheed Air Terminal, Inc. (hereinafter "Lockheed") is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the operator of the Hollywood-Burbank Airport and the owner of all but those portions of the Airport Described in Findings Nos. 6 and 18 which are held under lease from the federal government.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; Continental Air Lines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc.

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants Gilbert, McKenzie, Haven, Swanson and Gibson constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930, and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and

general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970, the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exceptions: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970.

The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. Almost one of every twenty people in the United States lives in the Los Angeles five-county area. This area is served by scheduled air carriers conducting operations from the Los Angeles International Airport and from four "satellite" airports: Hollywood-Burbank Airport, Long Beach Metropolitan Airport, Orange County Airport and Ontario International Airport.

11. Satellite airports are airports that serve geographical areas immediately adjacent to major metropolitan areas which also have one or more hub or major airport facilities. Other examples of satellite airports are the Oakland International Airport and San Jose Municipal Airport in the San Francisco area.

12. All of the above named satellite airports are surrounded by reasonably well-defined geographical areas which, by reason of the population they serve and their stage of urban development, warrant additional air services in their own right. Many persons living in these various geographical areas find it more convenient and responsive to their needs to have air service provided through their respective satellite airports than to continue their dependence upon the hubs.

13. Satellite airports play an essential role in the national air transportation system in relieving air and ground congestion, in reducing air traffic delays at primary airport centers, and in providing more con-

venient service to the surrounding population centers, which are of sufficient size and economic power to justify their own air service. This important role has been and is recognized and implemented by the Civil Aeronautics Board in its route investigations.

14. Hollywood-Burbank Airport is an important satellite airport in the national air transportation system and forms a vital link in interstate and intrastate air commerce. It is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of over 2.2 million persons.

15. The Burbank City Council has on several occasions, and as recently as May 13, 1969, requested and supported additional air transportation services at the Hollywood-Burbank Airport in various route proceedings before the Civil Aeronautics Board and the California Public Utilities Commission.

16. On May 12, 1970, in its Pacific Northwest-California Investigation, Docket No. 18884, the Civil Aeronautics Board determined that additional air service was required between the Pacific Northwest and the Los Angeles metropolitan area. The Board awarded a new route to Continental Air Lines and provided that this additional service be provided through the satellite airports in the Los Angeles metropolitan area, including Hollywood-Burbank Airport. The Mayor and City Council of Burbank expressly requested and supported this award of additional air service at Hollywood-Burbank Airport.

17. Hollywood-Burbank Airport is included in the National Airport Plan promulgated by the Adminis-

trator of the Federal Aviation Administration (hereinafter "FAA") pursuant to the Federal Airport Act of 1946, Ch. 261, 60 Stat. 170.

18. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lies on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

19. Prior to the commencement of operations involving jet aircraft landings and takeoffs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each

runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

20. In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in interstate and intrastate transportation. Approximately 97% of these operations were conducted by pure jet aircraft.

21. No air mail is presently carried to or from the Hollywood-Burbank Airport by any air carrier utilizing the airport's facilities.

22. No all-cargo flights are presently operated from the Hollywood-Burbank Airport, although such flights have been operated from the Airport in the past.

23. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The Administrator of the FAA has issued a type certificate covering each of these types of aircraft. Said type certificates provide that the type to which issued meets the airworthiness requirements of the Federal Aviation Regulations. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon. Comparable type certificates and airworthiness certificates are required by law in order to operate these business aircraft in air commerce.

24. Each scheduled interstate carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board (hereinafter "CAB"). The certificates issued to Air West and Continental provide that said carriers are authorized to engage in air transport-

ation with respect to persons, property and mail over specified routes into and out of Hollywood-Burbank Airport.

25. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA. Said certificates specify that each of said carriers is properly and adequately equipped and able to conduct a safe operation as an air carrier of persons, property and mail in scheduled air transportation between the points authorized in the air carrier's certificate of public convenience and necessity.

26. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which certificate provides that PSA is authorized to operate as a commercial operator to conduct common carrier operations carrying passengers and cargo intrastate on a scheduled basis. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission.

27. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport. Said Operations Specifications provide that each carrier is required to operate turbojet aircraft within the navigable airspace of the United States in accordance with instrument flight rules. The Operations Specifications issued to Air West and Continental provide that said carriers are authorized to use Hollywood-Burbank Airport as a regular airport; the Operations Specifications issued to United and Western provide that said carriers are authorized to use Hollywood-Burbank Airport as an alternate airport. The operations conducted by

each scheduled carrier at Hollywood-Burbank Airport are specifically authorized by each carrier's Operations Specifications.

28. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

29. Each aircraft operated by the regularly scheduled carriers that use Hollywood-Burbank Airport has been issued an Airworthiness Certificate by the Administrator of the FAA which certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the Type Certificate therefor and to be in condition for safe operation.

30. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA.

31. Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator.

32. Each flight engineer of a civil aircraft of United States registry is required to have in his personal possession a current flight engineer's certificate issued by the Administrator.

33. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for

and obtain an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51-(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, 84 Stat. 219 (May 21, 1970), within two years from the date of enactment in order to continue to serve air carriers certificated by the CAB. Management of Lockheed intends to apply for such a certificate under the regulations to be issued by the Administrator governing application.

34. The FAA exercises centralized management and control over the navigable airspace of the United States. The various Air Route Traffic Control Centers operated by the FAA throughout the United States are assigned responsibility for the management and control of the entirety of this navigable airspace.

35. The Los Angeles Center, located at Palmdale, California, exercises management and control of the airspace in a geographical area of approximately 184,000 square miles which is bounded on the south by the border between the United States and Mexico, on the east by the Colorado River, and which extends to mid-California to the north and 150 miles to sea to the west.

36. Pursuant to a license agreement with Lockheed, the FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport.

37. In connection with such operation, the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment.

38. The Los Angeles Center has subdelegated control over a portion of its navigable airspace, which portion is for this purpose defined geographically and vertically, to the FAA terminal facility located at Hollywood-Burbank Airport.

39. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such orderly control and separation, and which operates within controlled airspace identified as "control zones" and "control areas". Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area.

40. Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority.

41. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower. He is further required to comply

with all clearances and instructions that may be issued by Air Traffic Control. Air traffic control over the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility.

42. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Hollywood-Burbank Air Traffic Control. Prior to takeoff, pilots of aircraft that are required to operate under IFR must file their flight plans with the Los Angeles Air Route Traffic Control Center. Every fifteen minutes the FAA computer located at the Los Angeles Center provides updated flight departure information to the appropriate tower facilities and to sectors within the Center. When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with FAA Air Traffic Control. It is at that time assigned a runway for takeoff and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given a departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly.

43. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA takeoff procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Pictorial charts showing these standard instrument departure procedures in effect at Hollywood-Burbank Airport are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein. Control of aircraft crossing the boundary of the airport on takeoff is passed to Hollywood-Burbank Departure Control, which controls the aircraft and provides separation from other aircraft until the departing aircraft is ready to leave the air space subdelegated to the Hollywood-Burbank terminal facility.

44. As an aircraft departs the airspace subdelegated to the Hollywood-Burbank terminal facility destined, for example, for San Francisco International Airport, control of the aircraft is passed from Hollywood-Burbank Departure Control to the Los Angeles Air Route Traffic Control Center located at Palmdale, California. At about Paso Robles, California, control of the aircraft is passed on to the Oakland Air Route Traffic Control Center, which in turn passes control to the FAA terminal facility at San Francisco International Airport as the aircraft enters the navigable airspace subdelegated to that facility. The aircraft then remains under the control of the San Francisco facility until the aircraft has landed.

45. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing. No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance, which includes assignment by the FAA of a runway for landing. In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument.

46. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures in effect at Hollywood-Burbank Airport are

published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations.

47. During every portion of an IFR flight, the aircraft and pilot are operating under explicit instructions and control of an FAA facility.

48. The navigable airspace in the vicinity of major air terminals across the United States, including Los Angeles, is presently congested. This congestion has resulted in extensive delays at a number of the major airports. This condition exists because the services required by the American traveling public frequently exceed the capacity of the nation's airport system.

49. In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its goals the efficient use of such airspace, which includes the expeditious movement of aircraft. The goal of efficient use of airspace, although related, is separate and distinct from the goal of insuring the safety of aircraft.

50. The FAA exerts its power to achieve efficient use of navigable airspace in a variety of ways, including the utilization of flow control procedures and high density airport rules.

51. Flow control is a means of metering aircraft in order to meet any given traffic condition. Flow control restrictions are imposed by FAA facilities from time to time on commercial, business and other aircraft in order to minimize delays resulting from congestion or weather or equipment problems and to accommodate safely the maximum number of aircraft within the Air

Traffic Control System. A flow control restriction regulates the number of aircraft that can be accepted within an area and may restrict altitudes and/or routes to be flown during a specified period of time. When an FAA terminal facility or tower encounters a condition which will result in airborne delays of 30 minutes or more, the facility notifies its Air Route Traffic Control Center of this fact. The Center, in turn, will impose a flow control restriction on adjacent Centers. A flow control restriction obligates the receiving center to (a) clear aircraft on specified routes; (b) establish a separation in time, altitude or distance; or (c) limit the number of departures in a given period by holding aircraft on the ground. Thus the imposition of a flow control restriction by San Francisco can and does result in the Los Angeles Center's holding aircraft on the ground at Hollywood-Burbank Airport.

52. In 1970 the FAA instituted a system of centralized flow control. This system is managed by the FAA Central Flow Control Facility located at Washington, D.C. The Central Flow Control Facility coordinates and supervises the flow of air traffic throughout the Air Traffic Control System to minimize en route delays and achieve the maximum utilization of the air space. Under the new centralized flow control system, prior to imposing a flow control restriction, an Air Route Traffic Control Center must clear the proposed restriction through the Central Flow Control Facility in order to insure that proper coordination may take place within the system.

53. To provide relief from excessive delays caused by congestion at certain of the major airport terminals in the United States, the FAA prescribed High Density Traffic Airport Rules in December 1968, 33 F.R.

17896. These rules, as amended, are presently in effect. These rules designate John F. Kennedy, La Guardia, Newark, O'Hare and Washington National airports as high density traffic airports and restrict the hourly number of IFR operations (takeoffs and landings) at these airports to a specified number. The total number of IFR operations is allocated among various classes of users, namely scheduled air carriers, scheduled air taxis, and general aviation which includes business aircraft. Although the number of operations allowed varies during different periods of the day, the rules allocate operations for the entire twenty-four hour period. To operate to or from these designated airports, aircraft are required to have an arrival or departure reservation. These rules are intended by the FAA to work in conjunction with flow control procedures described in Paragraph 51.

54. Congress and the Administrator of the FAA are fully cognizant of the problems created by aircraft noise. In allocating the IFR reservations in the High Density Traffic Airport rules, the Administrator specifically had in mind the problem of the noise disturbance that would result from encouraging the scheduling of more flights after the hour of 10:00 P.M.

55. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing", and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable.

56. On September 4, 1969, acting pursuant to the authority of FAA Order 7100.13, the FAA Chief of the Airport Traffic Control Tower, Burbank, California issued an order (BUR. 7100.5B) prescribing a noise abatement runway use program at the Hollywood-Burbank Airport. This order makes Runway 25 the preferential runway for departures of turbine powered aircraft between the hours of 11:00 P.M. and 7:00 A.M. The preferential runway is assigned by the FAA control tower during these hours by incorporation into an aircraft's departure clearance as an instruction to the pilot. This order designating a preferential runway was a noise abatement measure for the benefit of the City of Burbank. In issuing this order, said FAA Chief took in hand the subject matter of nighttime takeoffs, and, based upon his authority and expertise, acted to minimize the noise consequences of such operations. However, in the landlocked, thickly populated area in which the Hollywood-Burbank Airport is located, the use of a preferential noise abatement runway is helpful in reducing noise over the City of Burbank, but such use merely diverts the noise to other populated areas.

57. Where possible, the FAA has developed standard instrument departures which are assigned between the hours of 11:00 P.M. and 7:00 A.M. in order to reduce noise over residential areas during those hours. Such standard departures are presently in effect at Los Angeles International Airport. In the event that one of these standard departures is not designated in the flight plan filed for a departing aircraft, such departure will be assigned during the indicated hours by incorporation into the aircraft's departure clearance as an instruction to the pilot.

58. The federal statutes and regulations and the orders of the Civil Aeronautics Board and of the Ad-

ministrator of the Federal Aviation Administration have so completely occupied the field of the regulation of the use of the navigable airspace and aircraft operations as to demonstrate that Congress left no room for local regulation such as the Burbank curfew ordinance.

59. Aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis. The transport aviation industry is unique and must be regulated on a national basis, both technically and economically, by the Federal Government. The approach to the solution of air transportation problems at the local level does not work. Regulation on a national basis is required because air transportation is a national operation.

60. The federal statutes and regulations governing and controlling the use of air space and air traffic touch a field in which the federal interest is so dominant as to preclude enforcement of a local ordinance such as the Burbank curfew ordinance.

61. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. On the average said flights served about 125 passengers, with an average of 80 being boarded at Hollywood-Burbank. At the time of the imposition of the Burbank curfew ordinance, this was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California. Both PSA and the traveling public were inconvenienced by the

required cancellation of this regularly scheduled commercial flight.

62. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

63. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

64. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

65. On August 29, 1970, Continental Air Lines commenced regularly scheduled service to Portland and Seattle from the Hollywood-Burbank Airport pursuant to authority granted May 12, 1970, by the Civil Aeronautics Board. These flights are operated utilizing Boeing 727-200 aircraft. In scheduling its flights along this route, Continental did not provide any departures within the Burbank curfew hours.

66. Should sufficient demand develop Continental anticipates adding another flight from the Pacific Northwest through the Hollywood-Burbank Airport. Such an additional flight would normally be added to depart from Seattle at about 8:00 P.M. in order to provide an even service pattern—morning, noon, dinner-time and after-dinner flights—throughout the day. The Burbank curfew ordinance, however, would restrict Continental from operating a southbound flight depart-

ing at that hour. A southbound flight from Seattle through Portland and San Jose, California, to Burbank and on to Ontario can depart Seattle no later than 7:00 P.M. in order not to violate the Burbank curfew.

67. If an 11:00 P.M. to 7:00 A.M. curfew on jet departures were to be enforced at Portland as well as at Burbank, Continental would be restricted from originating flights northbound and southbound along this Ontario-Burbank-San Jose-Portland-Seattle route between the hours of 7:00 P.M. and 7:00 A.M. Only 12 hours of the day would be available for originating such flights.

68. In the event of nationwide imposition of curfew ordinances, Continental would be able to originate departures eastbound on its route from Seattle through Denver, Wichita, Tulsa and Houston to New Orleans only between the hours of 7:00 A.M. and 2:00 P.M. On its Los Angeles through Denver to Chicago route, Continental would be able to originate departures eastbound only between the hours of 7:00 A.M. and 4:15 P.M. The available hours indicated do not take into account any allowance that would have to be made for the delayed arrival problem that would inevitably arise.

69. The problem of noise created by jet aircraft is well known, and it appears that if a curfew ordinance such as that before this Court were held valid, similar ordinances would be adopted by virtually all cities surrounding airports. A curfew ordinance cannot be considered solely in the accident of its particular circumstances because past experience indicates that such local legislation is highly contagious and that its spread to other localities is virtually inevitable if the curfew ordinance at Hollywood-Burbank is upheld.

70. The imposition of curfew ordinances on a national basis would have a near catastrophic effect on the national air transportation system, adversely affecting the aviation industry, members of the traveling public, and the national economy.

71. Continental Air Lines has 48 departures per day on its September 1970 schedule that fall within the curfew hours. If curfew ordinances were instituted on a nationwide basis, Continental would have to cancel all of these flights and would have to cancel flights during non-curfew hours as well because of the problem of positioning aircraft for return flights. These required cancellations would involve approximately 15% of Continental's domestic aircraft miles flown per day.

72. The required cancellation of Continental's night services would greatly inconvenience the traveling public as well as business and industry. Reduced rates on night flights enable many members of the public to travel by air at that time, and the largest proportion of Continental's air mail and air freight is carried at night. To replace the cancelled night services, Continental would have to purchase approximately six new Boeing aircraft at a cost of between \$5,000,000 and \$7,000,000 each. Continental's operating costs would be increased approximately 25% by reason of the reduced utilization of aircraft and the required purchase of additional equipment. These costs would be passed on to the traveling public.

73. There is reason to believe that the imposition of a nationwide curfew would affect the other certificated air carriers in a manner and to an extent comparable to the effects upon Continental described in Findings 71 and 72.

74. The Burbank curfew ordinances became effective on May 4, 1970. Between the hours of 11:00 P.M. (local time) on May 4, 1970, and 6:59 A.M. on May 5, there were 1,009 scheduled departures of pure jet aircraft operated by federally certificated air carriers from all airports in the United States. (International departures and departures by scheduled intrastate carriers and commuter air carriers are not included in this total and would increase the indicated number.) If curfew ordinances such as that before this Court were instituted on a nationwide basis, all of these flights would have to be cancelled. These cancellations would create positioning problems for the airlines, which would result in additional cancellations of flights during non-curfew hours.

75. The scheduling of aircraft is an extremely complex operation. Public convenience must be balanced with equipment and crew availability. In addition, schedules of the various airlines are interrelated due to the need to provide connecting flights. For example, approximately 30% of Continental's domestic business comes from providing connections with other airlines.

76. The scheduling operation is made more complex by the maintenance requirements of the air fleet. Hundreds of component parts must be maintained on a timed basis. The aviation industry performs the required maintenance on its aircraft at night at a limited number of maintenance bases. Continental, for example, has its major maintenance facility at Los Angeles International Airport. Continental's schedules are worked out so that an aircraft can return to this facility every day or two for maintenance. United Air Lines has six maintenance bases, and 12% of its fleet receives required maintenance every night. The imposition of

curfew ordinances on a nationwide basis would severely impair the efficiency of the maintenance system within the aviation industry by requiring the carriers to establish additional maintenance bases, which would involve more equipment and personnel at considerable increases in operating costs.

77. If curfew ordinances were imposed on a nationwide basis, the federally certificated carriers would be required to engage in extensive rescheduling of existing flights. This rescheduling would cause enormous inconvenience and expense to the air carriers and would result in a deterioration in air transportation services to the public.

78. The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme.

79. Based upon a study made at four major airports, it appears that over 48% of the nation's air mail is presently carried by flights departing between the hours of 11:00 P.M. and 7:00 A.M. The imposition of a departure curfew on a nationwide basis would thus cause at least a one-day delay in the delivery of billions of pieces of mail transported annually.

80. The air cargo industry virtually depends for its existence on its ability to operate at off-peak hours.

In large measure, the freight is assembled and loaded between the hours of midnight and 2:00 A.M. and then transported in flights departing in the early morning for distribution at the start of the business day. A study made in 1966 for the Aviation Development Council in New York showed that approximately 42% of the all-cargo services operated by certificated carriers would have to be cancelled if curfew ordinances were instituted on a nationwide basis.

81. Such cancellation would have drastic effects on the business community. For example, most of the cancelled checks that move throughout the country go through the New York Clearing House in one way or another. These checks are brought in by air freight. Because of air freight and because of its ability to move at night, these checks go through the clearing house the following morning. In 1965, according to the study made for the Aviation Development Council, this meant a saving in bank interest of \$34,000,000 per year. Today such saving would be close to \$100,000,000 per year. In addition, the ability to ship parts by air freight has allowed many businesses to effect significant savings by the elimination of large parts inventories formerly maintained at warehouses located throughout the country. This advantage would be lost to companies and their customers if air freight could not move at night.

82. The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace. The limitation on the time available for use of the airspace resulting from such imposition would seriously interrupt and impede the carriage of interstate passengers and goods and

would conflict with the federally certificated rights and obligations of the air carriers.

83. The evidence is uncontradicted that air commerce, by reason of its speed and volume, requires a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

84. If the use of the navigable airspace were curtailed through the enactment of curfew ordinances on a nationwide basis, interstate commerce would be subjected to an unreasonable burden and interference.

85. Any conclusion of law hereinafter recited which should be deemed a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of the action by virtue of 28 U.S.C. §1331(a) and 28 U.S.C. §1337; and jurisdiction over the parties.

2. This action arises under the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§1301-1542; the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §§1651-1659 (Supp. IV 1969); the Airport and Airway Development Act of 1970, Public Law No. 91-258, 84 Stat. 219 (May 21, 1970); the Constitution of the United States, Article I, Section 8, Clause 3 (the Commerce Clause), and Article VI, paragraph 2 (the Supremacy Clause). The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. The allegations of the complaint raise issues constituting an actual controversy concerning which the Court pursuant to 28 U.S.C. §2201, et seq., will make a declaration of rights.

3. All defendants reside in, and the claim arose in, this Judicial District.

4. The Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§1301-1542 (hereinafter the "Act"), established the Federal Aviation Agency, now the Federal Aviation Administration ("FAA"), headed by an Administrator who is made responsible under the Act for the exercise of all powers and the discharge of all duties of the FAA.

5. The Act vests in a single Administrator plenary authority for all aspects of airspace management and specifically charges the Administrator with the dual responsibility of insuring the safety of aircraft and the efficient utilization of the navigable airspace.

6. The comprehensive character of the Act demonstrates that Congress intended to provide the Administrator with the tools necessary to exercise his plenary authority. The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States," 49 U.S.C. §1508(a). Having granted to each citizen of the United States "the right of freedom of transit through the navigable airspace of the United States," 49 U.S.C. §1304, Congress further defined "navigable airspace" as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft." 49 U.S.C. §1301(24).

7. The Act conferred upon the FAA and upon its Administrator broad powers to regulate air commerce in the "public interest." 49 U.S.C. §§1303, 1341(a), 1348. The "public interest" is defined to include "the regulation of air commerce . . . to best promote its

development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States . . . in the interest of safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." 49 U.S.C. §1303.

8. The powers granted by the Congress are not dormant but have been actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail, and manifest sophistication.

9. The high density traffic airport rules, 14 C.F.R. 93.121-131, which regulate the number of IFR operations at certain major air terminals over the entire 24-hour period of the day, constitute control of the use and management of the navigable airspace by the Administrator to the end of insuring the efficient utilization of such airspace.

10. The system of flow control instituted by the FAA, under which aircraft can be held on the ground in order to reduce airborne delays and congestion, constitutes control of the use and management of the navigable airspace in accordance with the mandate of the Act, which is to insure the efficient utilization of such airspace.

11. To buttress the authority of the Administrator to deal with the question of noise abatement, in 1968 Congress amended the Act to require the Administrator to prescribe such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise.

12. FAA Order BUR 7100.5B, which establishes Runway 25 as the preferential runway at Hollywood-Burbank Airport for departures of turbine powered

aircraft between the hours of 11:00 P.M. and 7:00 A.M., constitutes regulation by the FAA on the subject of noise abatement.

13. An ordinance such as Burbank's cannot be considered solely in the accident of its particular circumstances, but must be weighed and tested as if imposed on a nationwide basis.

14. From the broad scope of the Federal statutes and regulations governing and controlling the use of air space and of air traffic, it is apparent that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for the safe and most efficient use of such airspace. The scheme of federal regulation is so pervasive as to demonstrate that Congress intended to preempt the field and to leave no room for local ordinances such as the Burbank curfew ordinance.

15. Air transportation calls for a more penetrating, uniform, and exclusive regulation than is necessary for any other mode of transportation. It is a uniquely national operation in which the federal interest is so dominant as to preclude the enforcement of state or local laws, such as the Burbank Curfew Ordinance, on the same subject.

16. There would be a very serious loss of efficiency, and the statutory objective of efficient use of the airspace as set forth in the Act would be compromised, as a result of nationwide imposition of curfews such as that imposed at Hollywood-Burbank Airport, and accordingly, the City of Burbank has no power to enact the ordinance in issue in this case.

17. Each federally certificated air carrier is authorized and obligated by statute and by its Certificate

of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. The Burbank curfew ordinance, by imposing a local veto for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution.

18. The Burbank curfew ordinance conflicts with the exercise of federal sovereignty over navigable airspace, 49 U.S.C. §1508(a), by imposing local control on its use, and, for the same reason, the ordinance conflicts with the federal right of each citizen of freedom of transit through the navigable airspace, 49 U.S.C. §1304, and is therefore void under the Supremacy Clause.

19. Under the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution, the states are not deemed to have authority (a) to impede substantially the free flow of commerce from state to state, or (b) to regulate those phases of the national commerce, which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

20. The nationwide imposition of ordinances such as Burbank's would seriously interrupt the carriage of

interstate passengers, mail, and goods and thereby substantially impede the free flow of commerce from state to state, and, considered on such a national basis, such ordinances could not stand.

21. The volume of air commerce, the speed with which it is conducted, the technical complexity of its scheduling and operation, and the limited availability of such of its essential aspects as airports, aircraft, air traffic routes, and aircraft maintenance facilities all make national uniformity of regulations prescribed by a single authority a necessity, so that this phase of the national commerce may be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

22. Plaintiffs and intervening plaintiff are entitled to judgment on their respective complaints for declaratory relief that each and every part and section of the Burbank curfew ordinance is unconstitutional, illegal and void.

23. Plaintiffs and intervening plaintiff are entitled to a decree that defendant City of Burbank and the individual defendants, and each of them, in their respective capacities as officials of the City of Burbank charged with the enforcement of the provisions of the Burbank curfew ordinance, their respective agents, servants, employees, attorneys and successors be enjoined and restrained by a permanent order of injunction of this Court from taking any action in pursuance of said ordinance.

24. Plaintiffs and intervening plaintiff are entitled to recover their costs of suit herein incurred.

25. Any finding of fact which should be deemed a conclusion of law is hereby adopted as such.

**LET JUDGMENT BE ENTERED ACCORDING-
LY.**

Dated this 30th day of November, 1970.

**/s/ E. Avery Crary
United States District Judge**

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RECEIPT ACKNOWLEDGED this 25th day of
November, 1970, at 4:00 p.m.

SAMUEL GORLICK, City Attorney, and
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APPENDIX E.

In the Matter of the Petition of Jordan A. Dreifus.

**United States of America
Federal Aviation Administration
Department of Transportation
Washington, D. C.**

In the matter of the petition of Jordan A. Dreifus to amend the Federal Aviation Regulations to prescribe aircraft noise regulations for turbojet aircraft operations at the Santa Monica, California Municipal Airport. Regulatory Docket No. 9071.

DENIAL OF PETITION

By letter dated July 19, 1968, and supporting letters dated September 3, 1968, October 1, 1968, January 27, 1969, March 3, 1969, March 6, 1969, March 18, 1969, and May 24, 1969, Jordan A. Dreifus, on his own behalf, petitioned for rule making to amend the Federal Aviation Regulations to prescribe noise restrictions and limitations for turbojet aircraft operating at the Santa Monica Municipal Airport.

In support of his request, petitioner makes the following arguments (here condensed):

- (1) Petitioner's residence near the airport is becoming exposed to increasing turbojet aircraft traffic and resulting noise.
- (2) Other airport neighbors are suing the airport seeking damages based on aircraft noise.
- (3) The FAA has the authority under section 307 of the Federal Aviation Act to issue noise standards governing the flight of aircraft at the airport.

- (4) New section 611 of the Federal Aviation Act gives the FAA the duty to issue noise standards governing the flight of aircraft at the airport.
- (5) New section 611 of the Federal Aviation Act has probably obliterated all State or local authority to issue such regulations.
- (6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. vs. Town of Hempstead*, 272 Fed. Supp. 226 (1966).
- (7) Under Agency Order 7110.13, entitled "Aircraft Noise Abatement Programs," the FAA has instituted voluntary noise abatement procedures for airports including runway use restrictions, air traffic control procedures, and routings where compatible with safety.
- (8) Failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions. The restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest. The local restrictions could be arbitrary, unreasonable, and obscure, and could discriminate against "general aviation" as distinct from interstate commercial carriage or "air transportation." Aside from resulting in litigation, local discrimination against "general aviation" would be contrary to the Federal Aviation Act of 1958.
- (9) Failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary

reason for the Federal Aviation Act of 1958, which was the unification of the control of aircraft operations in a single Federal agency to assure safety and the orderly development of aviation.

(10) State and local noise abatement restrictions would not be effective because of the uncertainty with which they would be met by the courts. Petitioner states that a Santa Monica municipal regulation concerning aircraft noise at the airport was recently declared invalid by a State court.

(11) The FAA has the authority to restrict the use of Washington National Airport.

Petitioner supplements the above arguments with noise exposure data developed by a consulting firm, a reference to noise levels specified in FAA Notice of Proposed Rule Making 69-1, the relationship of these figures to a Santa Monica Airport noise report, and newspaper articles concerning the severity of the airport noise problem.

Petitioner makes two basic requests, (1) a general request to issue any aircraft noise regulations "as may be necessary or appropriate in the circumstances" to relieve the noise burden on the neighbors of the Santa Monica Airport, and (2) a specific request to restrict the hours of operation of turbojet aircraft at the airport, as was attempted by the City of Santa Monica in the ordinance that petitioner states was held invalid by the State Court.

With respect to petitioner's first, general request, the FAA has, in fact, implemented Order 7110.13 (cited by petitioner) with respect to the Santa Monica Air-

port, in cooperation with the City of Santa Monica. This has involved (1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic patterns. In addition, the FAA monitors the conditions at the airport in order to anticipate new noise problems, or possible solutions, at the airport. Further, section 91.87 of Part 91 of the Federal Aviation Regulations prescribes noise abatement approach, departure, and runway requirements that must be complied with by turbine-powered and large airplanes. Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise should involve airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested. In light of the above, petitioner's general request for rule making not of the kind attempted by the City of Santa Monica is hereby denied.

In support of petitioner's specific request for time limitations similar to those attempted by the City of Santa Monica, petitioner states that such rules "would avoid a major area of possible dispute with surrounding residents." The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities. Petitioner states that the "final question for consideration is: what level of government has the power to so regulate or restrict aircraft operations? and what level of government *should* be the proper

level to exercise such power?" With regard to the existence of Federal power to substitute its judgment for that of the local governments who own and operate airports, the FAA agrees with petitioner (see petitioner's arguments 3 and 4 above) that the Federal Aviation Act provides broad powers in the field of aircraft noise abatement.

However, with respect to, the question as to which level of government would be the proper one to deny the use of airports to aircraft on the basis of noise considerations (as would be involved in the requested time limitations), the FAA does not agree with petitioner that new section 611 of the Federal Aviation Act has obliterated the authority of State or local government proprietors of airports (see petitioner's argument 5 above). To the contrary, Senate Report 1353, *Aircraft Noise Abatement*, July 1, 1968, (concerning Public Law 90-411, H.R. 3400, July 21, 1968, which added new section 611 to the Federal Aviation Act of 1958) makes the following statement of Congressional intent concerning the relation of the new legislation to local government initiatives, and in so doing adopts *verbatim* views expressed by the Secretary of Transportation in his letter to the Senate Committee Of June 22, 1968. (emphasis supplied):

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court

said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.* However, the proposed legislation will not affect the rights of a State or local public agency, as *the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft, and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. *The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment*

for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

The broader policy behind the above quoted letter of June 22, 1968, was earlier stated, in other terms, in the Secretary's letter of March 1, 1968, to the Committee on Interstate and Foreign Commerce of the House of Representatives (emphasis supplied):

Local communities should, if not inconsistent with overriding national interest, have the option to determine the effects of transportation on their environment. . . .

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. *In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.*

Based on the above guidelines, petitioner's remaining arguments (see above) supporting federally issued time restrictions at the Santa Monica Airport must be answered as follows:

Petitioner's argument 5, stating that new section 611 has probably obliterated all State and local authority to issue such regulations is not correct. While States may not use their police power to regulate in any way the flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Petitioner's argument 6, implying that the case of *American Airlines, Inc. v. Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport.

Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. This form of locally responsive noise control is clearly in the national interest in the light of the quoted portion of the Senate Report. Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied.

Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that, just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports.

Petitioner's argument 10, covering the uncertainty with which State and local noise rules would be met by the courts, must be answered directly from the congressional intent expressed in the Senate Report: any action that would prevent any public airport proprietor from taking any nondiscriminatory action to exclude aircraft on the basis of noise considerations would appear to conflict with that express congressional intent. In any case, as stated above, the Senate Report states that the Federal Government should not substitute its judgment for that of public airport proprietors on the issue of the service desired by those proprietors and their resulting judgments concerning the locally determined need to accept or exclude aircraft on the basis of noise considerations.

Petitioner's argument 11, concerning FAA authority to restrict operations at Washington National Airport is not valid since the FAA is the proprietor of that airport. Such action by the FAA would not be a substitution of its judgment for that of a state or local governmental proprietor.

Although no FAA regulation concerning the local Santa Monica airport noise problem is appropriate at this time for the reasons mentioned above, it should be noted, as stated in Notice 69-1, that the FAA is studying various types of operating rules for obtaining optimum noise levels around airports, and that, where such study indicates that appropriate rules can be developed, they will be issued as a notice of proposed rule making for public comment.

In consideration of the foregoing, I find that the requested rule making under sections 307 and 611 of the Federal Aviation Act would not be in the public interest and that the institution of rule making is not justified. Therefore, in accordance with sections 11.73 and 11.27 of Part 11 of the Federal Aviation Regulations, the petition of Jordan A. Dreifus for rule making under Sections 307 and 611 of the Federal Aviation Act, respectively, is hereby denied.

/s/ D. D. Thomas

D. D. Thomas

Acting Administrator

Issued in Washington, D. C. on 10 July 1969